unreasonably harsh toward the soldier. It is believed that the better reasoned authorities accord with the theory above advanced. The Rhode Island court relied in part upon this principle. So far as the opinion sanctions the view that state statutes or the rules of the common law may be overridden in the discretion of the military, it is believed to go too far. Everyone will sympathize with the attitude which strives in every way to facilitate the military and naval authorities in the successful prosecution of the war, and yet even in these times the courts must guard jealously our Anglo-Saxon heritage of "the supremacy of law."

THE NEGATIVE CONTRACT IN OPTIONS

An option is of value as a grappling-iron to enable the option holder to close at will with the option giver; it is no less of value as a buffer to keep other would-be contractors away from the option giver in the meanwhile. This last is worth remembering; sometimes a case serves to point the moral that it is.

For a valid consideration Mrs. Saraceno made an agreement with Carrano regarding certain of her real estate, "meaning . . . . to give to the said A. R. Carrano the option upon the purchase" of the property for $11,200, if Mrs. Saraceno "at any time should desire to sell said property." Nine years later Mrs. Saraceno brought suit to have the agreement cancelled and her property freed from any cloud created by it. The court held that the agreement was a "double option" under which the plaintiff might elect to sell or not to sell, and that after the lapse of nine years it was to be presumed that she had elected not to sell. Consequently, the court ordered that the agreement be cancelled and the plaintiff's property discharged from all encumbrance by reason of it. *Saraceno v. Carrano* (1918) 92 Conn. 563, 103 Atl. 631.

The general idea of *option* appears to contain several essential elements: (1) a power in the option holder, (2) to impose, wholly at his own choice, a duty upon the option giver, (3) which power is derived through a previous legal transaction between the two, is (4) of a certain permanence in point of time, irrevocable throughout its duration, which is fixed in advance, and (5) is accompanied by a duty in the option giver not to wipe out the power by conveyance to a *bona fide* purchaser for value, and (6) by a disability in the option giver to convey free of the option holder's power to any person not a *bona fide* purchaser. The ordinary offer of a contract is not an option because it lacks these last three elements.[1] The transaction in the principal case

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gested in Wyman, *Administrative Law*, secs. 2-3, that where a discretion is vested by law in the officer, his order will protect his subordinate, but where the officer's duty is ministerial merely, his order will not protect.

[1] *Dickinson v. Dodds* (1874, C. A.) 2 Ch. D. 463.

is not an option because it lacks the first two elements.[2] Carrano did not have the power at his own choice to impose a duty on Mrs. Saraceno. His right to require conveyance could not be acquired until she should desire to sell. On the affirmative side, therefore, Mrs. Saraceno's agreement seems worthless to Carrano, as unenforceable. But it is Janus-faced. It contains a negative promise: not to sell the land to any other person without first offering it to Carrano. This is but another phrasing of the language of the contract. The duty thus imposed can be gotten rid of, and the privilege and power to convey to another person can be acquired, only by offering the land to Carrano—and with that offer he would obtain a true, though short-lived, option. Mrs. Saraceno's privilege and power of free alienation are hedged in by this agreement; and her only way out is through the actual creation of that option.[3]

But Mrs. Saraceno called this pre-option agreement of hers an "option." The court refers to it as a "double-option." Thus is added one more to the many-featured creations to which the term option is applied; for even within the limits of the concept as defined above there are possible and there do exist a number of clearly distinct situations.[4] To insure sound decisions such distinct situations must be recognized and treated as distinct. In the principal case there is reason to believe that the court was led to consider the agreement lightly because it gave Carrano no power to compel conveyance on his own motion; the court did not, it is respectfully submitted, duly weigh the negative promise.

The court asserts that Mrs. Saraceno had a "right to elect not to sell" her property to anyone for $11,200, and that "after the lapse of nine years it is to be presumed that she made the choice and elected not to sell." But this, it is submitted, is not a fair interpretation of the agreement. The purpose of the parties was to secure Carrano

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[2] Much less would it seem correct to call it a "double option." In a double option each party should have a power; as, for example, where each pays a cash consideration and each promises to perform if the other shall so elect; or where a contract for the purchase and sale of land is concluded, the ripening of the respective duties being conditioned on the election of *either* party, within a fixed period, to demand performance; or where either party has the power on his own motion to terminate a contract, as in the New Jersey separation agreement treated *infra,* in RECENT CASE NOTES.

[3] *Manchester Ship Canal Co. v. Manchester Racecourse Co.* (C. A.) [1901] 2 Ch. 37; *contra, Fogg v. Price* (1888) 145 Mass. 513, 14 N. E. 741, where the court decided with hesitation, laying stress upon the lack of a definite price fixed in advance—though this hardly seems essential. Even in that case, however, the only thing in question was the *power* of alienation; the only thing refused was specific performance against a purchaser with notice; element (5) remains, enforceable in an action at law.

[4] See for detailed discussion Corbin, *Option Contacts* (1914) 23 YALE LAW JOURNAL, 641; see also (1917) 26 *ibid.* 783, and (1917) 27 *ibid.* 261.

an option to purchase if she "at any time should desire to sell said property." As indicated above, this is equivalent to a promise not to sell without offering to Carrano; which was to secure him the benefit of any change in Mrs. Saraceno's circumstances or mind. To say that she can terminate this duty merely by electing to do so, robs the contract, for which he gave consideration, of all value to him, and is an unsound construction of the parties' expression of intention. Indeed the very case the parties envisaged was before the court: one removes clouds on title that he may sell—to someone else.

The real problem of construction is to determine how long the duty was to last. Was it to bind the land in perpetuity, or only for a reasonable time in view of the situation of the parties at the time the agreement was made? Or—which is but a special form of the "reasonable time"—during Mrs. Saraceno's life? It is believed that the reasonable time construction might most fairly be adopted, and that the court's decision may be sustained on the ground that it had elapsed. But so far as the opinion involves a holding that the agreement reserved to Mrs. Saraceno a "right" to elect not to sell, it is believed to be unsound. The parties said nothing of a power in her to set the whole transaction at nought by electing *not* to sell. To read such a power into the contract decreases almost into nothingness the business value of the negative covenant included in such contracts.

RECOGNITION OF "MASSACHUSETTS RIGHTS" BY NEW YORK COURTS

The recent case of *Loucks v. Standard Oil Co. of New York* (1918, N. Y.) 120 N. E. 198 is noteworthy as marking a departure by the New York Court of Appeals not so much from its past decisions upon the problem involved as from the doctrines of the Conflict of Laws upon which those decisions were based.[1] A resident of New York had been wrongfully killed in Massachusetts by the act of a servant of the defendant, the latter being also a resident of New York.[2] Under the Massachusetts statute, conceded by all parties to be applicable to the case if the suit were brought in that jurisdiction, an action accrued in favor of the estate of the deceased for the benefit of his widow and children. This statute fixed the damages at not less than $500 nor more than $10,000, to be assessed not according to the loss suffered by the beneficiaries but "with a reference to the degree of culpability" of the defendant or his servant. The Court of Appeals

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[1] *Wooden v. Western N. Y. & P. R. R. Co.* (1891) 126 N. Y. 10, 26 N. E. 1050, apparently is in effect overruled.

[2] The defendant was a New York corporation. As is well known, it is common to regard such a "legal person" as a resident of the state in which it is incorporated. Of course this is pure fiction, based upon the fiction of corporate personality.